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## City of Brighton v. Township of Hamburg, 677 N.W.2d 349 (Mich. Ct. App. 2004)

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as requiring an average was unreasonable. If oxygen levels dropped below minimum for any length of time, there would not be enough oxygen in the water to sustain fish. Therefore, the BEP correctly interpreted the criterion as a matter of law.

Finally, Warren argued the BEP's re-opener provisions were void. This argument failed because the court concluded the provisions were necessary to ensure the state's water quality standards. Further, the provisions allowed Warren notice and a hearing, as well as an opportunity to appeal. Thus, the court held the BEP correctly included the re-opener provisions.

In summary, the Superior Court of Maine affirmed the decisions of the BEP because the evidence in the record was consistent with their judgment.

*Jennifer Suh*

## MICHIGAN

**City of Brighton v. Township of Hamburg, 677 N.W.2d 349 (Mich. Ct. App. 2004)** (affirming that the Michigan National Resources and Environmental Protection Act preempted a township ordinance regulating permissible wastewater discharge levels into state waterways).

The city of Brighton ("Brighton") applied to the Michigan Department of Environmental Quality ("DEQ") to expand its discharge permit for its wastewater treatment plant. The township of Hamburg ("Hamburg") filed an objection to Brighton's request with DEQ. The referee in the administrative hearing held in favor of Brighton. DEQ then issued Brighton a revised National Pollution Discharge Elimination Permit ("NPDEP"). However, to prevent the expansion of Brighton's wastewater treatment plant, Hamburg subsequently passed an ordinance that imposed more stringent restrictions on wastewater discharges than the restrictions imposed by NPDEP. Brighton filed suit in the Livingston Circuit Court, contending Michigan's National Resources and Environmental Protection Act ("NREPA") preempted Hamburg's ordinance. The trial court granted Brighton's motion for summary disposition on the grounds that NREPA preempted Hamburg's ordinance. Hamburg appealed to the Michigan Court of Appeals. On appeal, the court affirmed the preemption ruling.

To review the trial court's preemption ruling, the court applied the principles articulated in *People v. Llewellyn*. *Llewellyn* established a two-part test for determining whether state law precludes a municipality from enacting an ordinance. Pursuant to *Llewellyn*, state law preempts a local ordinance if: (1) the ordinance is in direct conflict with the state statutory scheme; or (2) the state statutory scheme occupies the field of regulation that the municipality seeks to enter, even where there is no direct conflict between the two regulatory schemes. The court found the second part of the *Llewellyn* test applicable, and there-

fore did not address whether a direct conflict between the ordinance and the state statutory scheme existed.

The second part of the *Llewellyn* test consists of four guidelines. State law preempts local law if the: (a) state law expressly provides that its regulation is exclusive; (b) legislative history implies preemption; (c) regulatory scheme is comprehensive and pervasive; or (d) nature of the regulated subject matter necessitates preemption. The court concluded the first two guidelines did not mandate preemption, because the NREPA did not contain an express preemption provision and the inconclusive legislative history of the NREPA regarding whether the legislature intended the NREPA to preempt local law. However, after applying the third and fourth guidelines, the court concluded the NREPA preempted Hamburg's ordinance.

The court, in addressing the third guideline, concluded the legislature, by passing the NREPA, created a comprehensive and pervasive state regulatory scheme. Under the NREPA, the DEQ was the sole agency authorized to establish pollution control standards and to issue permits for point source discharges into state waters. The DEQ also possessed exclusive criminal and civil enforcement authority and could seek injunctive relief for any violations of the NREPA or permits issued under the NREPA. The court concluded the far-reaching powers granted to the DEQ indicated that the legislature impliedly intended the NREPA to preempt local laws regarding the field of wastewater discharge regulation into state waterways.

Regarding the fourth guideline, the court concluded the subject matter of the regulation, waste discharge into Michigan's interconnected waterways, called for a statewide, uniform system of regulation. Through the NREPA, the legislature gave the DEQ sole authority for establishing and enforcing standards, and issuing discharge permits for all state waterways. The legislature, by vesting one agency with the power to regulate all state waterways, recognized that protection of state waterways required statewide, consistent, and coherent uniform policy. The court further noted that a patchwork of inconsistent local regulations substantially undermines the state's ability to control water pollution.

Additionally, the court noted that its application of *Llewellyn* in other environmental law cases reinforced its conclusion that the NREPA preempted Hamburg's ordinance. For example, the court previously held hazardous waste disposal statutes preempted local laws, because of the comprehensive statutory scheme and the subject matter necessitated statewide uniformity and consistency. Accordingly, the court affirmed the trial court's preemption ruling.

*Cheryl Miller*